



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 40 of 2013

IN THE MATTER OF ARTICLES 7, 8, 10, 20 OF LEGAL NOTICE NO. 6 OF 2006

AND

IN THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT

AND

IN THE MATTER OF THE ELECTIONS ACT

AND

IN THE MATTER OF THE POLITICAL PARTIES ACT

BETWEEN

**ERICK OKONGO
OMOGENI.....PETITIONER**

AND

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST
RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT.....2ND
RESPONDENT**

**HON ABUYA ABUYA.....3RD
RESPONDENT**

AND

**MARK CHACHA.....INTERESTED
PARTY**

REASONS FOR THE DECISION

1. By a Petition dated 29th January, 2013 the Petitioner herein, **Erick Okongo Omogeni**, sought the following orders:

- a. That the Honourable Court be pleased to certify that this application as extremely urgent and hear it *ex0parte* at the first instance.
- b. That the Honourable Court be pleased to issue a conservatory temporary order staying the directive by IEBC Committee requiring the 3rd respondent to pay the balance of the nomination fee and get the ODM ticket for Nyamira County senatorial seat and/or issue an injunction for 38 hours restraining the Respondents, their agents, servants or whosoever from presenting electoral papers, certificates for Nomination for Nyamira county senatorial seat and/or doing anything prejudicial to the Applicant until this application is heard inter-parties.
- c. That the Honourable Court be pleased to issue an order restraining the respondents, their agents, servants or whosoever from presenting electoral papers, certificates for Nyamira county senatorial seat and/or doing anything prejudicial to the Applicant until the hearing and determination of the Petition herein.
- d. That the Honourable Court be pleased to declare the Applicant as the duly nominated ODM SENATORIAL CANDIDATE for Nyamira County.
- e. The Honourable Court be pleased to give such further orders it deems fit and convenient.
- f. Costs.

2. On 31st January, 2013 we allowed this Petition to the extent that the decision made by the 1st Respondent herein, the Independent Electoral and Boundaries Commission, hereinafter referred to as the Commission in IEBC/NDRC/205/2013 was set aside. We further directed the complaint be heard afresh by the Commission by a panel excluding **Ms. Betty Nyabuto**.

3. The Petitioner's case was on the 18th January 2013 duly nominated by the Orange Democratic Movement Party (hereinafter referred to as the Party) to seek election for Nyamira County. On 25th January 2013 and 26th January 2013 he was attending funeral and church service respectively. According to him not only was he condemned unheard but one of the members of the Commission's Nomination Dispute Resolution Committee was one **Ms Betty Nyabuto** a sister in law to his main competitor who never disclosed the existence of a conflict of interest. Further the Petitioner alleged that the said member was partial. According to him the decision was a nullity having been made without him being heard.

4. According to the 3rd respondent, he was nominated unopposed and issued with according to him the petitioner was duly served with the petition and that the petition was defective since it referred to Garisa Township.

5. On the part of the party, it was submitted that the petition should be allowed since the petitioner did not follow the party's dispute resolution machinery hence the Commission's Tribunal acted *ultra vires* by purporting to conduct nominations on behalf of the party. The 3rd respondent having been disqualified, the petitioner was unopposed. By directing the party give nomination to one of the parties it was contended that the Commission was writing nomination rules for the Party.

6. On the part of the Commission it was contended that the parties were notified in the newspapers of the proceedings which were public knowledge and that the Party which was represented.

7. We have considered the evidence on record. The Petitioner's contention that the Commission proceeded in his absence without notification is not without merit. There is no evidence that the Party's internal dispute resolution mechanism was invoked by the 3rd respondent. It was also contended on behalf of the party that the 3rd respondent had not complied with the party's requirement with respect to the payment of the nomination fees. There was also the issue of the participation in the Committee's process by a person who it was alleged was related to the petitioner's competitor. There was no affidavit to controvert this allegation. All these factors coupled with the petitioner's contention that he was not

notified of the hearing led us to the conclusion that the process did not meet the Constitutional threshold under Article 47(1) and (2) which provide that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. It was also in contravention of Article 50 of the Constitution which provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

8. In **Owuor Okungu vs. Lazaro Onyango Civil Appeal No. 43 of 1982** the Court of Appeal held that a party should have notification before an order can be made to the prejudice of his rights. Obviously the order that was made by the Committee prejudiced the petitioner's rights as enshrined in Article 38(c) of the Constitution which provides that Every adult citizen has the right, without unreasonable restrictions to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office. It is trite law that Officials must comply with the rules of natural justice when exercising quasi-judicial functions and that each party must be given an opportunity to present their cases. See **Central Organisation of Trade Unions vs. Benjamin K Nzioka & Others Civil Appeal No. 166 of 1993.**

9. Therefore where two or more parties have a dispute, and there is an obligation on some person or body is to decide equitably between the competing claims, each claim must receive consideration and each claimant must be invited, not merely left so that if he chooses the initiative he can do it, to put forward the material in the form of documents or accounts which he desires to have considered, and the opportunity must be afforded to him of making comment on material of the same character which has been put forward by rival claimants and which the council are proposing to consider. See **Hoggard vs. Wordsbrough U. D. C. [1962] 1 All ER 468 at 471** it was held that Where a party has not been afforded an opportunity of being heard the process cannot be said to have been fair and the High Court has jurisdiction to reverse the decision of the Committee since that amounts to a defect in the process as opposed to the merits.

10. We therefore found that the Petition was merited due to procedural impropriety and breach of the rules of natural justice and for the foregoing reasons we held that we had jurisdiction to entertain the matter and consequently the Petition was allowed in terms of the orders hereinabove but with no orders as to costs.

Dated at Nairobi this 5th day of February 2013

D S MAJANJA

JUDGE

W KORIR

JUDGE

G V ODUNGA

JUDGE